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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1941

NO. 932

EDMOND L. VILES and
FRANCES N. VILES,
Petitioners,
vs.
THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to
the Circuit Court of Appeals for the Tenth Circuit.

BRIEF OF RESPONDENT

HORACE PHELPS,
For Respondent.

SUBJECT INDEX

	Page
STATEMENT OF THE CASE	1-4
BRIEF OF THE ARGUMENT	4-7
1. No recognized ground for the granting of certiorari appears	4
2. No question of importance, except to the parties, is involved. Granting of certiorari would have no result except to give the defeated party another hearing	4
3. The controversy which the present suit seeks to renew was decided upon the merits by the United States District Court for the District of Colorado, and the judgment was affirmed by the Circuit Court of Appeals for the Tenth Circuit. This Court denied certiorari (308 U.S. 626)	4
4. Primarily, the present application is based upon two contentions, neither of which can be sustained	5
5. The trial Court properly "dropped" the beneficiary as a party plaintiff. She had no interest and was improperly joined	5, 6
6. The plea of res judicata interposed by the defendant was good	6
7. To grant certiorari upon the present application would create an undesirable precedent and one likely to put an intolerable burden upon this Court. Litigants whose cases present no recognized ground for the granting of certiorari have no standing here and no claim upon the time of the Court	6, 7
CONCLUSION	7
CASES REFERRED TO	
Aetna Life Insurance Co. vs. Haworth, 300 U.S. 227	5
Burnet vs. Wells, 289 U.S. 670-680	5
DeFord vs. New York Life Insurance Co., 75 Colo. 146	6
Knights Templar, etc. vs. Gravett, 49 Ill. App. 252	6
Mutual Relief Assn. vs. Ray, 173 Ark. 9; 292 S.W. Rep. 369-401	6
Slocum vs. Northwestern National Life Insurance Co., 135 Wis. 288; 115 N.W. Rep. 796	6
Stray vs. Western States Life Insurance Co., 75 A.L.R. 950; 300 Pac. Rep. 1046 (Wash.)	6
Viles vs. Prudential, 311 U.S. 723	2
OPINIONS DELIVERED IN THE COURT BELOW	
Viles, et al. vs. Prudential Insurance Co., 124 Fed. (2d) 78	2
Viles vs. Prudential Insurance Co., 107 Fed. (2d) 696	2
Viles vs. Prudential Insurance Co., 96 Fed. (2d) 3	2

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STATEMENT OF THE CASE

Petitioners are here seeking certiorari to review the judgment of the Circuit Court of Appeals for the Tenth Circuit in

Viles, et al., v. Prudential Insurance Company of America, 124 Fed. (2d) 78.

The case presents in a changed form of action the same controversy which was adjudicated in

Viles, et al., v. Prudential Insurance Company of America, 107 Fed. (2d) 696.

Certiorari denied 308 U. S. 626.

See also Viles v. Prudential Insurance Company of America, 96 Fed. (2d) 3.

Following this court's denial of leave to file a second petition for rehearing in No. 621, October Term, 1939, 311 U. S. 723, a new suit (the present one) was brought in the state Court, removed to the United States District Court for the District of Colorado, decided adversely to plaintiffs in the last named Court and appealed to the Circuit Court of Appeals for the Tenth Circuit, where the judgment of the District Court was affirmed. Rehearing was denied, and the present petition followed.

No copy of the record filed in this Court has been furnished, so that specific reference to the pages or folios thereof cannot be made.

The present suit is bottomed upon the same disability provisions of the same policy of insurance involved in the former suit. That was a policy issued by respondent, The Prudential Insurance Company, upon the life of petitioner Edmond L. Viles, dated June 10, 1927, for $10,000.00, containing provision for disability benefits in case of total and permanent disability and naming petitioner Frances N. Viles as beneficiary, with right reserved to the insured to change the beneficiary. This policy lapsed on January 10, 1929, for non-payment of the semi-annual premium due December 10, 1928. The present suit was brought January 7, 1941, about twelve years after the lapse of the policy.

The pertinent policy provisions appear in a footnote in 96 Fed. (2d) at Page 4. The issues of fact and a review of the evidence in the trial of the first case appear in the opinion of the trial Court (not reported but appearing at Pages 206-221 of the record lodged in this Court in No. 621, October term, 1939).

The first suit was a suit in equity. The relief sought was

> "(a) That defendant be compelled to reinstate said Policy as of December 10, 1928.
>
> "(b) That premium due December 10, 1928, and all subsequent premiums be waived by defendant.
>
> "(c) That defendant pay plaintiff $100.00 per month since October, 1928, with the legal rate of interest added on all delinquent payments, and that said payments of $100.00 per month be continued as long as plaintiff is totally and permanently disabled."
>
> (d) For damages, costs and other proper relief.

A complete history of the first case, with pleadings, findings of fact, conclusions of law, decree, etc., attached as exhibits, is set forth in the second defense of defendant's answer in the present case as a plea of res judicata.

The second suit (the present one) is in form an action at law. Plaintiff, joining his wife, the beneficiary named in the policy, as a party plaintiff, seeks damages in a large sum for alleged repudiation of the contract of insurance. The facts alleged in the complaint are the same as those alleged in the amended complaint in the first action.

On motion of defendant, the trial court "dropped" Mrs. Viles as a party plaintiff, and upon inquiry into the merits of the case as required by U.S.C.A., Title 28, Section 835, found that the case was without merit, that the controversy had been fully adjudicated in the former case, and

dismissed the action. As already stated, the Circuit Court of Appeals affirmed.

BRIEF OF THE ARGUMENT

The following points are submitted in opposition to the present application:

I.

There is an absence of any recognized ground for the granting of the Writ of Certiorari.

II.

The case involves no question of importance to the public or to anyone except the parties. The granting of the writ would have no result other than to give the defeated party another hearing. This Court does not exercise its power nor make use of its jurisdiction to that end.

III.

The controversy which the present suit seeks to renew was decided upon the merits by the United States District Court for the District of Colorado, and the judgment of that Court was affirmed by the Circuit Court of Appeals for the Tenth Circuit in

> Viles v. Prudential Insurance Company of America, 107 Fed. (2d) 696.
>
> Certiorari denied 308 U. S. 626.
>
> Rehearing denied 309 U. S. 695.

In that suit all issues of fact tendered by the complaint in the present action were decided adversely to the plaintiff. The primary relief therein sought was reinstatement of the same policy of insurance upon which the present suit is based. Had the facts set forth in the amended complaint in that suit been proven, equitable relief would have

been justified. There was no "mistake of remedy." Plaintiff in that case elected to proceed in equity. Equity had jurisdiction. That forum was a proper one. No demand for jury trial was made; no such demand or request was refused. Moreover, there was no right of trial by jury. In the present suit, damages are sought for alleged repudiation of the policy. The facts alleged are identical with those alleged in the former suit. The only change is in the nature of the relief demanded.

IV.

Primarily the present application is based upon two contentions, neither of which can be sustained.

The first of these contentions is that in the former case trial by jury was denied. The record in that case lodged in this Court, No. 621, October Term, 1939, will be searched in vain for any suggestion that trial by jury was requested or denied.

The second contention is that it appeared in the former suit that plaintiff there had an adequate remedy at law; hence, that there was no jurisdiction in equity and that the decree rendered is void and constitutes no bar to a suit at law. The unanswerable answer to this is that equity did have jurisdiction, that the remedy sought was a proper one, and that the adverse decree rendered upon the merits forever barred another suit upon the same facts in any forum and in any form of action. In addition to the cases cited in the opinion of the Circuit Court of Appeals for the Tenth Circuit holding that a suit in equity "to declare the policy still in being" is a proper remedy, see

Burnet v. Wells, 289 U. S. 670-680; and
Aetna Life Insurance Co. vs. Haworth,
300 U. S. 227.

V.

The trial Court properly "dropped" the beneficiary as a

party plaintiff. She has and had no interest and was improperly joined as a party plaintiff.

The right of action for damages for wrongful repudiation of a policy of life insurance belongs to the insured and not to the beneficiary. The latter is without interest. In case of the death of the insured, that right of action passes not to the beneficiary named in the policy but to the personal representative of the insured.

DeFord vs. New York Life Insurance Co., 75 Colo. 146, 147, 148.

See also: Stray vs. Western States Life Co., 75 A.L.R. 950;

s. c. 300 Pac. Rep. 1046 (Wash.);

Mutual Relief Ass'n vs. Ray, 173 Ark. 9;

s. c. 292 S.W. Rep. 396-401;

Slocum vs. Northwestern National Life Ins. Co., 135 Wis. 288;

s. c. 115 N.W. Rep. 796;

Knights Templar, etc. vs. Gravett, 49 Ill. App. 252.

VI.

The plea of res judicata interposed by the defendant in the present case by the second defense of its answer, was good and shows that in the former case there was a final and conclusive adjudication of every matter and issue sought to be raised in the present action. Change in the form of action and the introduction of an additional plaintiff who has no interest do not give the right to another trial of matters already fully litigated and decided.

VII.

To grant certiorari upon the present application would create an undesirable precedent and one likely to put an

intolerable burden upon this Court. Disappointed litigants whose cases involve no question of public interest or concern, no Federal question, no "conflict of circuits," no question of local law which has been decided contrary to the applicable local decisions, indeed no recognized ground for the granting of certiorari, have no standing here and no claim upon the time of this Court.

CONCLUSION

It is hoped that this incomplete and informal memorandum may serve to lighten the labors of the Court, at least by making clear the nature of the case and of the questions involved and decided. It is submitted that the record shows the case to involve nothing more than a belated second attempt through litigation to restore vitality to a lapsed policy of life insurance. The attempt has not succeeded; the facts preclude success.

Respectfully submitted,

HORACE PHELPS,

For Respondent.